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No. 188.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906

THE UNITED STATES, *Appellant*

vs.

THE BETHLEHEM STEEL COMPANY

BRIEF FOR THE APPELLEE

JAMES H. HAYDEN,
Of Counsel for Appellee.

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THE UNITED STATES, *Appellant*,
vs.
THE BETHLEHEM STEEL COMPANY.

No. 188.

BRIEF FOR THE APPELLEE.

Statement of the Case.

On September 16, 1901, the Bethlehem Iron Company, predecessor of this appellee, filed its petition in the Court of Claims seeking to recover $21,000 as part of the price stipulated to be paid for gun-carriages, which the company had manufactured for and delivered to the United States, under an express contract with the latter (pp. 1–5).

While the suit was pending, the Bethlehem Iron Company transferred all of its contracts and other assets to the Bethlehem Steel Company, which thereupon assumed all of its contractual liabilities. This done the Bethlehem Iron Company, voluntarily, surrendered its charter and went out of existence. Under the statute (*R. S. U. S. sec. 3737*) this transfer of the contract in question rendered it void as against the United States.

On June 6, 1902, Congress passed an act (*32 Stat. L., 305, 308*) whereby it was provided that the Bethlehem Steel Company, as the successor of the Bethlehem Iron Company, should complete all contracts, theretofore made between the latter and the United States (save one which does not figure in this case); also that upon its giving security for the performance of these contracts, the Bethlehem Steel Company should be substituted therein for the Bethlehem Iron Company and "be entitled to exercise all rights thereunder which the Bethlehem Iron Company had or would have had if it had continued in existence." The Bethlehem Steel Company gave the requisite security, and on its motion (p. 6) the Court of Claims ordered that it be substituted for the Bethlehem Iron Company, as claimant in this cause (p. 7).

The contract in suit (pp. 3–5) provided that the claimant should manufacture and deliver six disappearing gun-carriages of a certain type, the deliveries of these several carriages to be made within stated periods. The United States agreed to take and pay for them at the rate of $36,000 each or $216,000 for all. It was further agreed that if any of the carriages were not delivered at the times specified, the Chief of Ordnance would be authorized to deduct a certain sum per diem for each day of delay, but it was expressly stated that any such deduction should be made as penalty. At the trial it was conceded that the carriages were manufactured, delivered and accepted. It was conceded also that they were not delivered within the

periods specified. It was conceded that the United States had paid $195,000 for the six carriages, and that the Chief of Ordnance had withheld the balance of the contract price, amounting to $21,000, as liquidated damages, which he assumed authority to deduct from the contractor's compensation on account of delays, which he attributed to it. The claimant charged that all of the delays were occasioned by acts of the defendant, and charged further that the United States having suffered no actual damage in consequence of the delays the Chief of Ordnance was not authorized to impose any penalty or to withhold payment of $21,000 or any part of the contract price.

After trial, the court entered judgment in the claimant's favor for the sum of $21,000 (*p. 14*). From that judgment the United States has appealed (*p. 7*).

The findings of fact which were filed along with the judgment (*pp. 7–14*), present the case as follows:

The claimant, the Bethlehem Steel Company, complied with the conditions prescribed by Congress (*32 Stat. L. 305, 308*) with respect to its substitution for the Bethlehem Iron Company, and was duly substituted for it as claimant in this cause (*pp. 7-8, Finding I*). On March 8, 1898, the Chief of Ordnance, U. S. Army, issued an advertisement, inviting manufacturers to present proposals to furnish six disappearing gun-carriages of a certain type to be constructed in accordance with certain plans and specifications (*p. 8, Finding II*). On March 11, 1898,, he directed letters to prospective bidders, suggesting that their proposals cover two alter-

nates—*first*, rapid delivery, such as to require the manufacturing plant performing the work to be kept in operation, day and night; *second*, "less rapid" delivery feasible by the operation of the plant, during ordinary working hours (*p. 8, Finding III*). On March 19, the claimant submitted four distinct proposals, by each of it offered to furnish five or more carriages. (*Id., p. 8*). The terms of the several proposals were as follows: (1) $31,000 per carriage, the first one of them to be delivered within six months after the date of the contract, the remaining five at the rate of two carriages in the course of each succeeding period of three months. (2) $33,000 per carriage, the first one of them to be delivered within five months from the date of contract and the rest at the rate of one carriage in the course of each succeeding month. (3) $35,000 per carriage, the first to be delivered within four months from the date of the contract and the rest at the rate of three carriages in the course of each succeeding period of two months, and (4) $36,000 per carriage the first to be delivered within four months, the second within five months, and the rest at the rate of two carriages in the course of each succeeding month. The department accepted the claimant's fourth proposal (*p. 9, Finding IV*). On April 4, 1898, the Chief of Ordnance sent the claimant a draft of the proposed contract (*p. 9, Finding VI*). The claimant declined to sign it and returned it at once to the Chief of Ordnance with a letter in which certain objections to it were stated, including this (*Id., pp. 9–10*):

> "We also note that the *penalty* mentioned in the contract for each day of delay in delivery of each carriage is $75, instead of $10, as is stipulated in the instructions to bidders and specifications. We made our bid under the understanding that the *penalty* for non-delivery was to be $10 per day, and we respectfully request that the contract forms be modified in accordance with this understanding."

On April 9, 1898, the Chief of Ordnance sent the claimant a new draft of the proposed contract. It contained the same provisions with respect to penalty as the first draft. It was accompanied by a letter in which he said (*Id., p. 10*):

> "In regard to the *penalty* for delay in delivery being $75 per day instead of $10 per day, I have to state that the former amount is the average difference in time of delivery between your price recently bid for slow delivery of these carriages and the price under the accepted bid. The department feels it to be just that this average difference should be the *prescribed penalty* * * * ."

On April 16, 1898, the Chief of Ordnance again wrote to the claimant (*Id., 10–11*) saying that an error had been made in his calculations which led him to name $75 per diem as the proper rate of *penalty*, and that he would change the rate from $75 to $35. On April 20, 1898, the claimant wrote to the Chief of Ordnance (*Id., p. 11*), agreeing to the proposed penal clause and suggesting that the schedule of deliveries be changed so that it would require the delivery of "the first carriage within four months,

the second within five months, and the remaining four at the rate of two per month." On April 25, 1898, the Chief of Ordnance replied (*Id., p. 12*) that the proposed change of schedule would be adopted "without enforcement of *penalties* which would result therefrom." With his letter he enclosed a new draft of the contract, embodying the amendments agreed upon. The contract as executed (*pp. 3–5*) bore date April 4, 1898, though for obvious reasons it could not have been signed by either party until after April twenty-fifth.

It contained these clauses:

> "Under advertisement dated ——— 189–, the said parties of the first part (Bethlehem Iron Compay) do hereby contract and engage with the said United States to manufacture for the Ordnance Department, U. S. Army, in accordance with said instructions to bidders as amended, specifications and drawings all of which are hereto attached and form part of this contract."
>
> * * * * * * *
>
> "Six (6) Disappearing Gun Carriages, Model 1896, for 12-inch B. L. Rifles, drawings dated April 27 and June 19, 1896, (latest revision July 14 and December 30, 1897,) at thirty-six thousand dollars ($36,000) each, free on board cars at South Bethlehem, Pa.
>
> The first carriage to be delivered within four (4) months from date of this contract, and the remaining five (5) carriages within six (6) months from date of this contract."
>
> * * * * * * *

"It is further stipulated and agreed that if any carriage herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, thirty-five ($35) dollars per day from the price to be paid therefor for each day in delivery of each carriage respectively. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

All *penalties* incurred under this contract shall be offset against any payments falling due to the said party of the first part."

The gun-carriages having been manufactured by the Bethlehem Company were delivered to and accepted by the United States on the following dates: (1) January 28, 1899; (2) March 6, 1899; (3) April 13, 1899; (4) March 18, 1899; (5) April 29, 1899, and (6) May 27, 1899. The intervals between the stipulated and the actual dates of delivery ranged from 165 to 204 days and in the aggregate amounted to 1,096 days (*p. 12, Finding VII*). The Chief of Ordnance declared that the claimant was responsible for delay to the extent of 100 days on each carriage, or 600 days in all. Instead of $216,000, the full contract price, he paid the claimant for the six carriages $195,000. The difference, amounting to $21,000, was charged to the claimant as liquidated damages at the rate of $35 per diem (*pp. 12–13, Finding VII*). On June 28, 1901, the

claimant received the sum paid and receipted for it under protest, whereby it asserted its right to receive the contract price in full, and declared that the receipt of the lesser sum must not be considered a waiver of its rights to demand, sue for and recover the balance (*Id., pp. 12–13*). The court found as an ultimate fact that agents of the United States hindered and delayed the claimant in the performance of its work by changing the design of the carriages, and in various other ways; but that the claimant contributed to the delay by failing to provide sufficient equipment and by undertaking work other than that required by the contract in suit. The court was unable to determine the extent to which the respective parties had contributed to the delay. It found as a fact that the United States was not ready to make use of the carriages when they were delivered and could not have used them if they had been delivered sooner, also that the United States did not suffer any damage whatever in consequence of the delay (*pp. 13–14, Finding VIII*).

The opinion of the court below (p. 14) is brief, but shows that the case was fully considered and the following conclusions reached: (1) The penal clause of the contract as written and as understood by the parties provided that in case of default on its part, the claimant should forfeit, as *penalty*, an amount equal to the damage suffered by the United States, but did not authorize a deduction from the claimant's compensation, as liquidated damages; (2) The government having suffered no actual damage in consequence of the delay, the de-

duction made at the rate of $35 per diem on each carriage would have been excessive, even if the delay had been wholly attributable to the claimant.

ARGUMENT.

I.

1. *The contract in suit is free from ambiguity and the parties are bound by it. Resort cannot be had to their transactions which occurred while the contract was in fieri, for the purpose of showing that they intended something different from the import of the language employed in the instrument.*

As we have seen the penal clause of the contract (p. 4) provided for a deduction, to be made in the discretion of the Chief of Ordnance, in the event of claimant's default, and then, in terms, referred to the deduction as a *penalty*.

The findings of the Court of Claims disclose several proposals, presented by the claimant for the manufacture of the gun-carriages, in question and other transactions of the parties which occurred while the contract in suit was *in fieri* (*pp. 8–12, Findings II–VI*). But one proposal was mentioned in the contract and by that the contractor offered to furnish the carriages for the sum of $36,000 each. The appellant seeks to have the court interpolate into the contract all of the preliminary transactions, and upon them bases an argument to the effect that the motive of the Chief of Ordnance in accepting the claimant's tender referred to in the contract was to secure extreme celerity, in the delivery of the carriages. In other words the appellant, by this means, seeks to make it appear that what the parties, by their contract

termed *penalty*, was, in reality, a species of bonus, which the government was willing to pay for early deliveries, and that it represented the agreed worth of rapidity in manufacture. This is a novel position for the United States to take. Heretofore, in suits against the United States it has often been argued by claimants that proposals submitted by them or representations made to them with respect to the subject-matter of proposed contracts should be considered by the court when interpreting the formal instruments. The United States has invariably insisted that the strict rule of the common law forbidding the admission of extrinsic evidence to modify the terms of written contracts, when apparently free from ambiguity, must be adhered to. With entire consistency, this court and the court below have approved the contention of the United States and been governed by the common law rule. In the case of *Simpson et al* v. *U. S.* (*172 U. S., 372, 379*), Mr. Justice White, delivering the opinion of the court, said:

> "Considering the facts above stated it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation. The rule by which parties to a written contract are bound by its terms, and which hold that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations by reference to the negotiations which preceded the making of the contract or by urging that the pecuniary result which the contract has produced has not come

> up to the expectations of one or both of the parties is too elementary to require anything but statement.'

In the case of *Brawley* v. *U. S.* (*96 U. S., 168, 173*), there were findings whereby the Court of Claims set out transactions of the parties, which had occurred, prior to the execution of the contract. Mr. Justice Bradley, delivering the opinion of this court, said:

> "All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside consideration."

To the same effect are *Van Buren* v. *Digges* (*11 How., 461, 466*); *Harvey et al* v. *U. S.* (*8 C. Cls., 501*, II) *506, 508.*

II.

2. *If they were relevant matter, the negotiations of the parties, which preceded the execution of the contract, would not sustain the contention of the United States, to the effect that the stipulation concerning penalty was intended to provide for a deduction, as liquidated damages, or something else.*

A review of the preliminary correspondence which passed between the Chief of Ordnance and the Bethlehem Company shows that the parties understood what they were doing when they signed the contract, and that the penal clause providing in terms for the imposition of *penalty* in case of the contractor's default, was framed

by the Chief of Ordnance, exactly as he wished it to be framed. The contract was drawn by him no by the claimant. The liability to be incurred by the contractor for delay in delivering the carriages, was referred to by the Chief of Ordnance as *penalty* in letters which he directed to the claimant on April 9, 1898 (*p. 10*), and April 25, 1898 (*p. 12*), and was denominated *penalty* by the Bethlehem Company in its letters, written to the Chief of Ordnance on April 5, 1898 (*pp. 9–10*), and April 20, 1898 (*p. 11*). There is nothing to indicate that the parties attempted to ascertain what loss the government would suffer from delay, or that they fixed by agreement the measure of damages to be recovered in case of the company's default. No rational flight of imagination could lead to a construction of the contract, such as the Attorney General asks the court to adopt, namely: that the sum to be paid to the contractor was not fixed; but left to be determined in accordance with a sliding scale of rates, whereby a certain minimum should represent the price of a carriage as such, and in addition thereto appropriate allowance should be made as a reward for rapid work. Before such a conclusion could be reached the court would be obliged to expunge the existing contract, and write a new one for the parties.

In the case of *Dakin* v. *Williams* (*17 Wendell, 447*), Nelson, Ch. J., said:

> "From a critical examination of all these cases and others that might have been referred to, it will be found that the business of the court in construing

this clause of the agreement, as in respect to every other part thereof, is to inquire after the meaning and intent of the parties, and, when that is clearly ascertained *from the terms and language used*, it must be carried into effect. *A court of law possesses no dispensing powers it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements.* If they are competent to contract within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement."

3. *The contract is to be interpreted as one which provided for a forfeiture or penalty, in case of the contractor's default.*

Apart from the plain and unambiguous terms of the instrument, the fact that the delay, *caused by both parties*, did not occasion actual damage to the United States, and the further fact that a deduction made as liquidated damages, at the arbitrary rate of $35 per diem on each carriage, would be extortionate and lead to an unjust result, furnish sufficient reasons for the conclusion reached by the Court of Claims (p. 14).

Questions of the same general nature as the one before us have been passed upon by this court and other courts of this country, as well as by those of England. At first glance these authorities seem to present inconsistencies, but upon more careful inspection the apparent differences of opinion are accounted for by differences in the terms of the contracts considered and in the facts presented by the several cases. Taking

them altogether, these rules may be, fairly, deduced: (*a*) In the absence of cogent reasons, a court will not allow claims for liquidated damages where the contract in question does not, in terms, stipulate for them. (*b*) Where the language employed in contracts is obscure, courts are strongly inclined to interpret them as calling for forfeitures, to be made as penalty, rather than for liquidated damages; and (*c*), in the absence of actual damage, consequent upon one party's default, the court will not, if the terms of the contract permit any latitude, award liquidated damages; but will interpret the contract as calling for penalty, rather than permit a recovery of imaginary damages, where none have in fact been suffered.

In the case of *Tayloe v. Sandiford*, (*7 Wheat., 13, 17*), Marshall, Ch. J., delivering the opinion of the court, said:

> "In general a sum of money in gross to be paid for the non-performance of an agreement is considered as a *penalty*, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breech of the contract by the opposite party. It will not, of course, be considered liquidated damages, and it will be incumbent on the party, who claims them as such, to show that they were so considered by the contracting parties. *Much stronger is the inference of its being a penalty when it is expressly reserved as one, the parties denominating it themselves a penalty, and it would require very strong evidence to authorize the court to say that their own words do not express their own intention.* These writings appear

to have been drawn on great deliberation, and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms that they employed."

The Supreme Court of New York, in the case of *Spencer* v. *Tilden* (*5 Cow., 150*), said:

"This doctrine, which converts damages apparently stipulated or fixed by the parties into a penalty, came from the civil law, through the court of chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that in order to enforce it, courts must disregard the particular expressions of the parties; for the moment we agree that a party may, by calling a real penalty liquidated damages or throwing it into the form of an alternative in a contract, or substituting its payment for some specified default, to secure the whole himself, without regard to the real damages, bring back the oppressive rule of the common law. The gripping creditor will always use the particular form of phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if it be in truth, plainly beyond the legal amount of damages, so far it shall be no more than nominal."

In the case of *Van Buren* v. *Digges* (*11 How., 461*) the contract considered related to the construction of a house and provided that, if the builder did not complete it by a day certain he should forfeit ten per centum of the contract price. The court said (pp. 476–477):

"The second exception by the defendant states that in addition to the evidence previously tendered by him, he offered proof tending to show the peculiar adaptation of the house contracted for, both in its design and situation to the defendant's personal and professional pursuits and convenience, and that the amount of ten per centum on the contract price stipulated to be forfeited if the house were not entirely finished and ready for occupation as therein provided, on the 25th of December, 1844, was intended by the parties as and for liquidated damages that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th of December, 1844, and that the court refused to hear the evidence thus tendered. *In the refusal of the court to admit the evidence thus tendered we think they decided correctly. It would have been irregular in the court to go out of the terms of the contract and into the consideration of matters wholly extraneous, and, with nothing upon the face of the writing pointing to such matters as proper or necessary to obtain its construction or meaning. The clause of the contract providing for the forfeiture of ten per centum on the amount of the contract price, upon failure to complete the work by a given day cannot properly be regarded as an agreement or settlement of the liquidated damages. The term forfeiture imports a penalty. It has no necessary or natural connection with the measure or degree of injury which may result from a breech of contract or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts*

> *of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty. In a defense like that attempted by the defendant in the Circuit Court upon the essential justice and fairness of the acts of the parties, a positive immutable penalty could hardly be applied as a fair test of their merits.*"

The case of *Smith Co.* v. *U. S.* (*34 Ct. Cls., 472*), was a suit upon a contract which contained this clause (p. 479):

> "And the party of the first part (contractor) further agrees to *forfeit* the sum of twenty dollars per day for each and every day's delay in completing and delivering the work after the said date, and the amount thereof to be deducted from any sum which might be due to the said party of the first part in the hands of the light-house establishment."

The work was not completed until sixty-four days after the date named in the contract, and, on that account, the United States "deducted from the price agreed to be paid for the work the sum of twenty dollars per diem." The court found that the contractor was in default, in consequence of which the United States had suffered actual damage to the amount of $256. After a careful review of the pertinent decisions, Peelle, J., delivering the opinion said (pp. 483–484):

> "* * * We must hold that the *forfeiture* of the sum of $20 a day for each and every day's delay in completing and delivering the work was intended by the parties as a *penalty* for the failure to perform the contract, rather than the measure of injury for the delay; and this we think is the reasonable con-

struction of the language used, independent of the intention of the parties, and that, therefore, the claimant is entitled to recover the amount so deducted from the consideration price of the contract, less the sum of $256, actual damage sustained in the employment of the inspector. * * *"

Gay Manufacturing Co. v. *Camp* (*65 Fed. R., 794, 798–800; C. C. App. 4th Circuit*). The plaintiff, as receiver of the Gay Manufacturing Company, leased to the defendant certain land at a stated rental, for a term of two years, authorizing the lessee to cut timber standing upon the land, paying the lessor for the same at stipulated rates. The lease provided that, if, through the default of the lessee, the lease should be terminated prior to the expiration of the term, the damage suffered by the lessor should, in addition to rent unpaid and the balance due for timber cut, include the sum of $5,000, which the parties estimated, assessed, and accepted as liquidated damages to be paid by the lessee to cover the interruption of the lessor's earnings, possible loss of rent or necessity for selling timber at prices lower than those stipulated, all of which latter items would necessarily be uncertain and difficult of ascertainment. Default was made in the payment of rent and lessors entered about six weeks prior to the end of the term. All arrears of rent and claims for timber cut were paid, subsequently, by the lessee. Lessors sued for breach of the contract, claiming $5,000 as liquidated damages. Held, that in view of the facts and the terms of the lease, the provision for payment of $5,000 as damages must be held to authorize the imposition of nothing but penalty. The court said:

> "If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult if not vain, then the courts will incline to give the relief which the parties have agreed to, but if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the court from inquiring into the actual injury sustained and doing justice between the parties."

The case of *Halliday et al* v. *U. S.* (*33 Ct. Cl., 453, 465*) resembles closely the one at bar, though there the contract did not expressly provide, as did that of the Bethlehem Company, that, in the event of the contractor's default, the deduction from his compensation should be made as *penalty*. The contract related to the construction of a house. The house was not completed within the time stipulated. The penal clause read:

> "In case of neglect or failure of the said parties of the first part (contractors) to complete the above-mentioned house agreeably to and in conformity with the specifications and plans and the terms on the contract, on or before the date specified for the completion thereof, there shall be deducted the sum of twenty-five dollars per day from the amount thereunder, *in the discretion of the Secretary of the Smithsonian Institution, for each and every day that the completion and erection of said house as agreed may be delayed beyond the time specified in this contract.*"

The Secretary ordered that there be deducted from the contractor's compensation a certain sum as agreed and

liquidated damages. Notwithstanding the fact that the *deduction* provided for was to be made in the discretion of the Secretary of the Smithsonian Institution, the court held that the contractor was liable for nothing but penalty, the amount of which must be determined by that of the actual damage suffered by the government. The court gave the claimant judgment for the unpaid balance of the contract price, less the actual damage.

In the case of *Davis et al.* v. *U. S.* (*17 Ct. Cls., 201*) it was held that:

> "In determining whether the amount named in a contract shall be taken as a penalty or as liquidated damages, courts are influenced largely by the reasonableness of the transaction and are not restrained by the forms of the agreement nor by the terms used by the parties, nor even by their manifest intent, which will be carried out so far only as it is right and reasonable."

In the case of *Edgar Thompson Works Co.* v. *U. S.* (*34 Ct. Cls., 205*) claimant sued for an unpaid balance of the price fixed by contract for the work done. Payment of this balance had been withheld by the government, alleging that the contractor had made default by reason of which it became liable for liquidated damages equal to the balance. The contract provided:

> "And the party of the first part (contractor) further agrees to forfeit the sum of twenty-five dollars per day as liquidated damages, for each and every day's delay in completing either portion of the work embraced in the two deliveries, after the said times, the

amount thereof to be deducted from any sum which might otherwise be due the said party of the first part in the hands of the light-house engineer."

After reviewing a large number of authorities, the court said (p. 220):

"Words of penalty and words of liquidation are used in the contract. The party is to forfeit the sum of $25 per day as liquidated damages."

Again (p. 221):

"Each case must be governed by its peculiar facts, and no general rule can be prescribed in doubtful cases to determine the question as to whether the provision is to be regarded as a penalty or be enforced as compensation for the injury. The contract of the parties will be enforced as liquidated damages if conscionable, but, in doubtless cases, will be construed as a *penalty;* and thereby enforce against the delinquent a responsibility only to the extent of allowing the injured party *a just compensation for the injury sustained.*"

Again (p. 222):

"Taking into consideration the doubtful and contradictory language of the agreement in connection with the unreasonable result as to damages in applying the theory that the agreement is to be construed as fixing a compensation, it is the opinion of the court that the deduction mentioned in the contract must be regarded in the nature of a *penalty, and as no damages are shown, claimants are entitled to*

recover the sum of $3,250, and for that amount a judgment is entered."

In the case last cited, the court quoted with approval two opinions of Attorneys General, rendered in response to questions not unlike the one before us. In a case where the contract provided that $50 per day should be forfeited "to be deducted from the amount which may be due, on the completion of the work, as liquidated damages" Mr. Attorney General Devens said (*15 Opin., 418*):

> "The contract, as I understand from your letter having been faithfully performed and no damage whatever having been sustained by the government by reason of the delay in its performance, the conditions which, in the contemplation of the agreement are necessary for the exaction of the penalty under consideration do not exist. To exact it from the contractor under these circumstances would not be warranted by the law or justice of the case. I am therefore of the opinion that you are authorized to release him from that penalty."

Taking the same view of the law, Mr. Attorney General Olney said (*21 Opin., 28*):

> "Inasmuch as the forfeiture or penalty incurred here was one imposed by the contract between the parties and not by any act of Congress, and the work contracted for has all been finished according to the contract, and no actual damage has resulted to the United States, and the penalty was one from which, in like cases, a court of equity would grant relief, I am of opinion that the Secretary of War has authority

> to remit the forfeiture provided for in the contract and to order payment of the entire sum withheld from the contractor."

It should be noted that, if the two contracts considered by the Attorneys General had provided for deductions to be made as liquidated damages, an executive officer would not have been authorized to waive the government's right to deduct the same, any more than he would have been authorized to give away tangible property belonging to it.

The extent to which the courts are governed by the fairness and justice of the results obtained by treating a stipulated forfeiture as a penalty or as a measure of damage, is well stated in the American and English Encyclopedia of Law (Vol. 19, 2d Ed., p. 411):

> "It has been held that the magnitude of the stipulated sum should be regarded not only as compared with the value of the subject of the contract, but with reference to its proportion to the probable consequences of the breach and where a stipulated sum is so great that it is apparent that the provision was inserted *in terrorem*, it will be held to be *penalty* and not liquidated damages." (Citing *Scofield* v. *Tompkins, 95 Ill., 190; Wilcus* v. *Kling, 87 Ill., 107; Bradstreet* v. *Baker, 14 R. I., 546; Fitzpatrick* v. *Cottingham, 14 Wis., 237; McCann* v. *Albany, 11 N. Y. Appellate Div., 378.*)

As stated by the court below in its opinion (p. 14) a deduction from the contract price of one of the gun-carriages in question at the arbitrary rate of $35 a day, for

delay covering one year, would have amounted to $12,-775, or more than 35 per cent. of the price of the carriage. Consider this in connection with the fact found, that the government was not prepared to use the carriages when they were actually delivered, and that the government suffered no loss in consequence of the delay in their delivery, and we may, without the least unfairness, say that the rate of penalty named in the contract was inserted by the Chief of Ordnance *in terrorem*.

4. *Replies to Appellee's Argument.*

(*a.*) *Time was not of the essence of the contract.* The Attorney General contends that it was (*Brief, pp. 8 and 9*). To sustain that proposition, he must, according to the authorities cited by him (*Taylor* v. *Longworth, 14 Peters, 172, 174*; *Jones* v. *U. S., 96 U. S., 24*; *Secombe* v. *Steele, 20 Howard, 94–104*) show that it was made so by express stipulation or by implication from the nature of the property and the avowed objects of the seller and purchaser. Aside from naming a period within which the gun-carriages should be delivered, the contract in suit contains nothing to indicate that time was of the essence. The penal clause itself shows that the parties contemplated the possibility of delays occasioned by acts of one or both of them. Neither can it be implied from the nature of the property that time was of the essence. The conduct of the parties and the situation of the United States shows that it was not. The progress of the work was hindered by changes ordered by the Chief of Ordnance. The carriages were accepted with-

out complaint long after the date fixed by contract for their delivery. The United States was not ready to make use of them when delivered. It could not have made use of them had they been delivered sooner. It would simply have been put to the expense of storing and caring for them.

(*b.*) *As shown in division 3 of this argument, the contract provided for the imposition of penalty in case of default, and authorized no other manner of deduction from the contract price.* The Attorney General contends that, notwithstanding the express terms of the contract, it was contemplated by the parties (1) that in case of the contractor's delay, deductions from the contract price would be made at an arbitrary rate per day, as liquidated damages (*Brief, pp. 10–24*), or (2) that the parties intended to provide for the payment of $31,000 each for the carriages, plus a bonus at the rate of $35 per day on each carriage, if delivered before the times mentioned in the claimant's proposal No. 1 (p. 8), provided that, bonus included, the price paid for each carriage should not exceed $36,000. (*Brief, pp. 24–25.*) Most of the authorities cited in support of the first of these propositions are cited and relied on in this brief to support the position taken by the appellee. Not one of them sustains the government's contention. With respect to the second proposition advanced by the Attorney General, I can only repeat, what I have already stated, that it is utterly without foundation, and that, without demolishing the contract itself and constructing a new one out of suppositions as to what the parties

meant to do or should have done, the court cannot convert a deduction into a bonus or a penalty for delay into a premium for rapidity of work.

But one case cited by the Attorney General appears to require notice, namely, *Sun Printing & Publishing Co.* v. *Moore* (*133 U.S., 642*). It is readily distinguishable from the case at bar. It grew out of a charter party by which the association hired Moore's yacht for a definite term. The charterer agreed to keep the vessel in repair, to pay all of her running expenses, and, upon the expiration of the charter, to return her in good condition. In other words, the association became a bailee for hire with the absolute obligation to return the property. It was further provided that in case of the charterer's default in this particular it should pay to the owner a certain sum, representing the agreed value of the yacht. While in the service of the charterer, the yacht was lost. The owner demanded payment of her agreed value, together with charter money, and, upon the refusal of the association to pay it, brought suit. This court held that the charterer's obligation to return the vessel being fixed and unqualified, and the value of the vessel, according to the terms of the contract, having been ascertained and agreed upon by the parties, it would be doing violence to the plain language and obvious intent of the parties to permit the charterer to show by way of partial defense that she was worth less than the stipulated value.

Between the parties to the case at bar, the relation of bailor and bailee did not exist. It is conceded that the gun-carriages delivered were those contracted for, and, as such, they were accepted by the United States. There

was no agreement with respect to, nor any intelligent attempt to ascertain, what damage, if any, the United States would suffer, if the delivery of the carriages were delayed through the contractor's fault. It does not matter, who may have been responsible for the delay, we know that the United States suffered no damage in consequence of it. While the penal clause in the contract, like all clauses of that kind, did name a definite rate of penalty, this was intended simply to cover any actual damage, occasioned by a possible default, the effect of which could not be foreseen but might well be ascertained after the occurrence.

I submit that the court below committed no error.

JAMES H. HAYDEN,
Of Counsel for Appellee.

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No. 188.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

BETHLEHEM STEEL COMPANY.

Supplemental Brief for the Appellee.

At the argument of this cause, three questions were discussed concerning which a supplemental statement may be of service to the court.

I.

Responsibility for delay in the delivery of the gun carriages.

By its seventh finding (pp. 12 and 13) the Court of Claims found that the delays in the deliveries of the six carriages aggregated 1,096 days; that the Chief of Ordnance decided that delays to the extent of 496 days were attributable to acts of the defendant, (United States), and that the balance of the delays, amounting to 600 days, were attributable to the claimant (Bethlehem Company). In its eighth finding the court said (p. 13):

> "The court finds as the ultimate fact that the *defendant's (United States)* officers *hindered* and *delayed the claimant (Bethlehem Company) in the performance of the work by changes in the plans of*

construction, as alleged in the petition and in various other ways, but the court also finds that the claimant (Bethlehem Company) contributed to the delay in the completion of the work, by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings. And the Court further finds that the transactions in the process of manufacture were so involved and intermerged *that it is impossible on the evidence produced, for the court to ascertain and determine whether the defendants (United States) should be charged with a greater proportion of the delays set forth in the foregoing table in finding VII than those assumed by the defendant's (United States) officers, to wit* 496 *days,* out of the total amount of delays, to wit, 1096 days."

I submit that the meaning of the finding is this: Both parties—the United States and the contractor—contributed to the delays. Because of the extent and complicated character of the work involved in the manufacture of the carriages, the Court of Claims could not determine from the evidence offered by the claimant and defendant whether the United States should be held responsible for more than 496 days of the delay, that being the amount for which the Chief of Ordnance conceded the Government's responsibility.

The Chief of Ordnance was not qualified to act as an arbiter in apportioning responsibility for the delay. His mere statement cannot be regarded as an award which was binding upon the Bethlehem Company. The Chief of Ordnance was a party to the contract. He drew the instrument, and all business with respect to its execution and performance was conducted by him or by his authority. It is not permitted to any man to be both a party and the judge in one cause (*Barlow v. U. S.,* 35 Ct. Cls., 514, 543-545). Hence the so-called decision of the Chief of Ordnance, whereby he declared that the contractor was responsible for delay to the extent of 600 days, is to be regarded as no more than an expression

of his views on the subject. The finding shows that the court did not accept his views and was not able to state whether he had dealt fairly with the Bethlehem Company or not. The Chief of Ordnance made his apportionment of responsibility for the purpose of reducing the Bethlehem Company's compensation below the figure stipulated in the contract; in other words, for the purpose of exacting a forfeiture. The law abhors forfeitures and the courts will not uphold them unless the fact that they have been incurred is clearly proven. The finding shows that the Bethlehem Company's responsibility for the full extent of the default charged to it by the Chief of Ordnance was not proven. That being the case, the Chief of Ordnance had no right to claim it, and the Court of Claims was right in refusing to uphold his so-called decision.

II.

The parties are bound by their contract. It was drawn by the Chief of Ordnance. If, through ignorance or carelessness on his part, it was made to provide for the imposition of penalty in case of the contractor's default when it would have been more convenient or desirable for the Government to have had a clause providing for the deduction of liquidated damages, that fact cannot be considered a valid reason for disregarding the plain terms of the instrument.

In his closing argument for the appellee, the Attorney General suggested that, while Secretary of the Navy, he had been obliged to revise many of the contract forms which were in general use in the Navy Department, because his subordinates did not appear to understand the difference between *penalty* and *liquidated damages*, and in drawing their contracts customarily made provision for the imposition of penalty when the convenience or advantage of the Government would have been better served by pro-

visions authorizing the deduction of liquidated damages. This suggestion was made apparently with the idea that the court should assume that in this case the Chief of Ordnance of the War Department and the Bethlehem Company mutually made the same mistake when they used the word penalty. I submit that it cannot be assumed that an official of the War Department made the mistake detected by the Attorney General among officials of the Navy Department. I submit further that, even if he did, it cannot be assumed that the Bethlehem Company fell into the same error. The record shows that the contract was made in the most deliberate fashion, having been drafted and redrafted by the Chief of Ordnance. To use the words of Chief Justice Marshall, found in his opinion in the case of *Taloe v. Sandiford* (7 Wheaton, 13, 17):

> "No slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms that they employed."

I submit that the Attorney General's admission with respect to the change, that he, as Secretary of the Navy, found it necessary to make in the contract forms of his Department, in order that they might authorize the deduction of liquidated damages, is a most forceful argument in support of our contention that the contract in suit is to be interpreted as one which authorized no deduction from the contractor's compensation unless made as *penalty*.

III.

The United States having suffered no damage in consequence of the delay in the delivery of the carriages, the Bethlehem Company is entitled to recover the balance of the contract price remaining unpaid.

The court's attention was called to the fact that the Court of Claims had found this (pp. 13 and 14):

> "It does not appear that the defendants were ready to use the gun carriages hereinbefore described at the time when they were finally delivered by the claimant; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth."

The Attorney General argued that, if these facts were sufficient to deprive the Government of the right to impose penalty for default, a party having a contract for the construction of a battleship might delay her completion for several years, and upon her delivery say to the Government, "You have not been damaged. I have saved you the cost of maintaining this vessel during the period of delay." He overlooked this most essential feature of the finding: the United States, according to the Court of Claims, was not prepared to *use* the gun carriages in question when they were delivered, and could not have *used* them if they had been delivered sooner. Had they been delivered sooner, it could have done nothing but store them. The fortifications wherein they were to be installed had not been completed. Such a situation differs materially from a case where the delivery of a completed battleship has been delayed, for there the Government presumably would have been prepared to *use* her from the moment of her delivery.

Respectfully submitted,

JAMES H. HAYDEN,
Of Counsel for Appellee.